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In the
Supreme Court of the United States

REGINALD WILKINSON, at al.,
Petitioners,

v.

CHARLES E. AUSTIN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF CORRECTIONS PROFESSIONALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The amici herein are corrections professionals, all of whom have substantial experience in prison administration, including managing high-security prisoners, and most of whom have served as prison wardens or as chief administrators of prison or jail systems. Their expertise may assist the Court in assessing the issues before it from the practical standpoint of prison management.

Walter J. Dickey, the primary author of this brief, served as Administrator (now "Secretary") of the Wisconsin Department of Corrections from 1983 to 1987. His appointment followed his drafting, after extensive consultation with prison staff and managers, the Administrative Code for Correction, which regulates all aspects of the Wisconsin correctional system as well as the parole and probation systems, including a detailed disciplinary code and procedure, criteria for program and security placement and institutional transfers, and all other operational aspects of prison life and administration from the grievance system to the use of force to prison visits.

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of the brief.

During these consultations and as Administrator, he attended hundreds of hearings concerning prisoners' classification and discipline. Subsequently, he served as Chair of the Task Force on Sentencing and Corrections appointed by Governor Tommy G. Thompson in 1996 and as Chair of the Committee on Intensive Sanctions appointed by the Speaker of the Assembly Wally Kunicki in 1991. In 2000, he served on the Wisconsin Legislature's Criminal Penalties Study Committee which was charged with planning the implementation of "truth in sentencing" in Wisconsin. He has, since leaving Corrections, informally advised all of his successors. He has written extensively on sentencing and corrections.[2] He is presently serving as Monitor, by appointment of Judge Barbara Crabb of the Western District of Wisconsin, in litigation concerning conditions at Wisconsin's "supermax" prison at Boscobel, Wisconsin (recently renamed the "Wisconsin Secure Program

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[2] *See, e.g.*, *Punishing Inequalities: Race and Criminal Justice in Wisconsin* (with Joel Rogers and Michael Smith), Wisconsin Academy Review (2001); *What If Corrections Were Serious about Public Safety* (with Michael Smith), 2 Corrections Management Quarterly (1998); *Corrections: Budget and Policy Issues for the 1990s*, in *Dollars and Sense* (LaFollette Institute for Public Affairs, 1994); *A Future for Research on Prisons*, 16 Law and Social Inquiry 101 (1991); *Criminal Justice Administration* (with Frank J. Remington et al.) (3d ed. 1990); *The Promise and Problems of Administrative Rulemaking in Corrections: The Wisconsin Experience*, 1983 Wis.L. Rev. 285 (1983).

Facility"), in which he helped mediate settlement.[3] He is a member of the faculty of the University of Wisconsin–Madison Law School, to which he was appointed in 1976.

Charles M. Montgomery spent 23 years in the United States Federal Bureau of Prisons, beginning as a correctional officer and then serving in a variety of progressively responsible positions including Director of a halfway house, Superintendent of a prison camp, Associate Warden of a federal correctional institution, Chief of Unit Management, and one of five Division Managers in Federal Prison Industries. He has also served as Warden at the State of Georgia's largest maximum security Prison, Director of Institution Operations for 28 facilities in the Commonwealth of Puerto Rico, and Lead Consultant and Member of a Special Management Team for the Rio Piedras Prison Complex in Puerto Rico. He has served as an independent correctional consultant and expert witness over the past 18 years.

Donald A. Cabana, Ph.D., is Warden of the Mississippi State Penitentiary and has served as Acting Commissioner of the Mississippi Department of Corrections and as wardens of prisons in Missouri and Florida. His publications include *Death at Midnight: The Confession of an Executioner* (Boston: Northeastern University Press, 1996).

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[3] *See Freeman v. Berge*, 68 Fed.Appx. 738, 2003 WL 21462603 (7th Cir. 2003) (affirming approval of settlement); *Jones'El v. Berge*, 164 F.Supp.2d 1096 (W.D.Wis. 2001) (granting preliminary injunction with respect to inmates with mental illness).

Steve J. Martin began his law enforcement career as a correctional officer in the Texas Department of Corrections and subsequently served as an attorney in its counsel's office, as General Counsel, and as Executive Assistant, the third highest-ranking official in the agency. He is presently an independent consultant on correctional administration and an attorney, and has served as monitor in prison litigation both by court appointment and by the parties' agreement. He has consulted with the United States Department of Justice concerning conditions in numerous jails and prisons. He is the author of *Texas Prisons: And the Walls Came Tumbling Down* (Austin: Texas Monthly Press, 1988) (with Sheldon Ekland-Olson).

Toni V. Bair has served as Assistant Commissioner in the New York City Department of Correction, as Regional Administrator in the Virginia Department of Corrections supervising 11 prisons, and as Warden of the maximum security Mecklenburg Correctional Center in Virginia and the Utah State Prison. He is presently an independent consultant on correctional management (including use of force, control of violence, and management of high-security prisoners) and Adjunct Professor in the Department of Criminal Justice at Weber State University, Ogden, Utah, where he teaches correctional law, management, and other corrections courses.

E. Eugene Miller has served as Correctional Facilities Administrator in Alaska with responsibility for the operations of six adult and two juvenile institutions, as Administrator of the Women's Detention Center of the District Columbia, and as Acting Superintendent of the Massachusetts Correctional Institution at Norfolk. He has been Director of Criminal Justice Services for The NBBJ Group, where he worked with

architectural design teams in designing prisons and jails; and Vice President of C.M. Security Products, Inc., a manufacturer of building components and security equipment for the corrections and security fields. He has taught criminal justice-related subjects at the American University and Virginia Commonwealth University. He is the author of *Jail Management* (Lexington, Mass: Lexington Books, 1978). He is presently an independent criminal justice consultant and has evaluated hundreds of prisons in the United States and foreign countries, including several supermax units, working with clients including, *inter alia,* the United States Department of Justice.

David Bogard served as the Director of Corrections for Arlington County, Virginia and as Special Assistant to the Superintendent of the Philadelphia, Pennsylvania jail system. Mr. Bogard is a Commissioner on the Commission on Accreditation for Corrections of the American Correctional Association, and has also served on the Standards Committee of the American Correctional Association. He has conducted jail management training and has recently authored a manual for correctional administrators on direct supervision operations in prisons and jails for the National Institute of Corrections, an arm of the United States Department of Justice. Mr. Bogard is currently a principal in the criminal justice planning firm of Pulitzer/Bogard and Associates, which consults on correctional operations and management projects throughout the country, and has worked as an expert witness and consultant, including developing master plans for state corrections departments and evaluating correctional practices.

SUMMARY OF ARGUMENT

The decision to confine a prisoner in highly restrictive supermax confinement is enormously important to the prisoner, to prison staff and administration, and to other prisoners. Such confinement has a devastating impact on prisoners' already limited quality of life and will usually also extend the length of the prisoner's incarceration. On the other hand, supermax facilities are intended to confine the most disruptive and dangerous prisoners to protect the safety and security of prison staff and other prisoners. Prisoners and correctional administrators thus have a common interest in accurate and reliable fact-finding and decision-making in supermax placement and retention decisions.

Characterizing supermax confinement decisions as "predictive" and "multivariate," as the Respondent has done, obscure the fact that such decisions are ultimately based on facts and on inferences from facts. For these decisions, like others in the prison setting, careful fact-finding procedures remain necessary for accurate and reliable decision-making.

There are pressures in the correctional environment that can result in "overclassifying" inmates to supermax facilities. The temptation to "dump" troublesome prisoners may result in inappropriate supermax placement of those who are merely prone to complaint or litigious or whose reputations as disruptive or gang-affiliated prisoners are inflated. It may also result in the placement of mentally ill prisoners in the highly restrictive supermax environment, where their condition is likely to worsen and they may commit additional misconduct justifying their retention in the supermax. There may also be

pressure to place inmates in a supermax facility simply because cells are available there while other facilities remain crowded.

To control these pressures and avoid inappropriate and unnecessary supermax confinement, it is essential that the prison system have clear standards and criteria for placement and retention, strong fact-finding procedures carried out by a disinterested body within the prison system, and review of those decisions by higher authorities in the prison system.

The supermax placement process should therefore include clear criteria for decision. The prisoner should receive adequate advance notice of all the reasons for the proposed placement, and disclosure of the evidence subject to necessities of security and safety, so the prisoner can respond meaningfully to them at the placement hearing. While cross-examination is not helpful in this setting, the hearing body should be prepared to inquire into the sources and reliability of the information presented. Prisoners should be able to call witnesses where there are factual issues that witnesses may helpfully address, subject to correctional necessity. The hearing body should find facts specifically (by a standard no lower than "more likely than not") and analytically relate them to the criteria for placement in its findings, both to facilitate higher-level review of the decision and to ensure that the hearing body has carefully weighed the facts as they relate to the placement criteria.

The decision to release from supermax facilities should be done as carefully and reliably as the placement decision and with equivalent procedural protection. The object of the decision should be to end supermax confinement as quickly as possible consistent with safety and security, and avoid imposing

such harsh conditions of confinement for any longer period than necessary.

I. THE DECISION TO PLACE A PRISONER IN CLOSE CUSTODY OR SUPERMAX IS ENORMOUSLY IMPORTANT TO THE PRISONER, TO STAFF AND ADMINISTRATION, AND TO OTHER PRISONERS.[4]

Maintaining order in prison is essential to the welfare of everyone there: administrators, staff, and especially prisoners.

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[4] The term "supermax" does not have a precise meaning. It is generally used to refer to maximum security or close custody segregation units which are designed and/or operated to provide some combination of greater isolation among prisoners, less contact with staff, less out-of-cell time, and less access to or even sight of the outdoors than in the traditional prison segregation unit. Traditional segregation is often merely a standard cellblock in which prisoners are kept locked in their cells most of the day but remain able to communicate with each other, interact with staff, go to an exercise yard, etc. Some maximum security units display some or all of the characteristics of a supermax unit without being so labelled. *See, e.g.*, *Madrid v. Gomez*, 889 F.Supp. 1146, 1228-29 (N.D.Cal. 1995) (describing Pelican Bay "Security Housing Unit," designed to minimize staff-inmate contact, with cement exercise pens permitting no view of the outdoors). There is no question that the restrictive characteristics of the OSP facility, as described by the district courts, merit the supermax label.

Most prisoners want and need order because a daily life characterized by disorder, chaos, and personal insecurity is dangerous and debilitating.

There are three principal ways in which prison order is achieved. The first is the prisoners' acceptance of the rules of prison life, which is obtained by having legitimate rules that are necessary and fairly enforced. Unnecessary rules and unfair enforcement do not promote order in prison, they threaten it by undermining the rules' legitimacy and with it the prisoners' acceptance of them. The second is through incentives: the ability to get out of cells, go to work, school, meals, exercise, visits and special events – routine activities, but vital to the quality of prisoners' lives. The last resort is through physical and structural restraint: handcuffs, leg irons, bars and locks. Though these are surely the most publicly visible tools of maintaining order, it is the informal forces – the desire for order, personal safety, and social contact (including work, school, and personal development) – which most profoundly shape order maintenance in prison.

Supermax prisons are an extreme example of reliance on the third method of control, one that prison administrators in some systems rely on when lesser means of keeping order have failed.

The decision to place an inmate in extremely restrictive custody in a Supermax prison is of enormous importance. The safety of staff and prisoners requires that those who have demonstrated their dangerousness be reliably identified, separated and closely controlled. For the prisoner so confined, such confinement profoundly affects the quality of life in prison

as well as the opportunities for release from prison, so it is crucial to avoid erroneous Supermax placement. Moreover, the existence of a Supermax facility presumably is intended to help deter the kinds of dangerous and disruptive behavior that result in placement there, but it will not deter effectively if prisoners are placed there arbitrarily, without relation to the actual gravity of their behavior. Thus there is a convergence of interest of prisoners and correctional administrators in accurate and reliable fact-finding and decision-making and in the legitimacy of the decision-making process.

The decision to place a prisoner in Supermax confinement is actually more significant than prison discipline, because it affects the quality of life of individual prisoners more than virtually every disciplinary sanction. (Most disciplinary sanctions in a prison do not involve segregation, but some lesser and more temporary loss of liberty and privileges, such as cell confinement, loss of recreation and extra work duty.) Placement in a supermax is far more restrictive than the most serious disciplinary measure – segregation – if only because it is ordinarily of longer duration. But it also vitally affects the duration of overall confinement in prison for the individual, and limits the possibility that the prisoner can demonstrate the ability to live at lower security levels. The latter is usually a precondition for release in systems which have discretionary release, by informal practice if not by formal policy. Placement in such high-security confinement also typically limits the prisoner's ability to earn "good time" or other release credits. Thus supermax placement effectively extends the duration of incarceration in most prison systems today. Moreover, supermax is a setting which limits the prisoner's opportunity to earn money, to have contact visits, and to engage in

educational, vocational, or rehabilitation programs (lack of which may further extend incarceration). It is also a setting in which prisoners are more likely to be disciplined (often resulting in further loss of good time), because of the effect of conditions on prisoners and staff. After all, extended confinement under conditions of sensory deprivation creates enormous psychological pressure on prisoners. And staff treat prisoners who in every encounter are handcuffed and in chains, or behind locked doors, much differently than when these restraints are not present.

II. THE CHARACTERIZATION OF THE PLACEMENT DECISION AS "MULTIVARIATE" AND "PREDICTIVE" OBSCURES ITS ESSENTIAL QUALITIES.

Which prisoners require close custody or segregation is a question of judgment, and judgments differ. But, like all matters of judgment, these decisions ought to be reached through fact-finding and inferences from the facts. So, the circumstances under which it is exercised ought to encourage thoughtful inquiry into and finding of the facts, their possible significance, and the relationship of those facts and inferences to the system's criteria for placements in Supermax.

It is vital that the fact-finding for placement in Supermax be accurate and reliable, because it affects the safety of prisoners and staff; because it profoundly affects the individual so confined; and because to do less undermines the legitimacy of the order maintenance regime in a prison. If these judgments are not fair in fact, or not perceived to be fair by those affected, they undermine the rule of law we want

prisoners to adhere to - in prison, and when they return to live amongst us. Perhaps the most powerful influence on prisoner behavior is that which they see modeled by prison staff. No one has an interest in anything other than reliable fact-finding in support of this vital decision. No one has an interest in undermining its legitimacy.

The characterization of the decision as "predictive" and "multivariate" disguises its most vital qualities. The decision as to placement depends on facts and on inferences drawn from those facts. The facts that are relevant to the decision about future behavior are of a variety of kinds. Some are historical, usually behavioral. (What did the person actually do?) Others are contextual. (The inmate was found guilty in a disciplinary process of assault. Was the assault part of a fight or unprovoked? What gave rise to the incident?) Because historical and contextual facts are used to make a judgment about the future, even the most simple example shows how important the facts and the context are. For these reasons, any suggestion that the "multivariate" and "predictive" aspects of the decision lessen the need for careful fact-finding procedures is badly mistaken.

Predictions about future behavior require attention not only to past behavior and inferences about proclivity, but also to the possible circumstances in which the inmate might be placed. If the need is for control, what are the situations available which might afford the necessary level of control? This is a comparative decision and requires reference to the possible placements and the plausibility they will afford the necessary control, as well as an analysis of the other implications of the decision, for the prisoner and for others.

Clarity, specificity, and judgments made to a specified level of certainty are surely possible in this area of life, as they are in so many others.

III. THE CORRECTIONAL ENVIRONMENT CREATES PRESSURES INFLUENCING SUPERMAX PLACEMENT DECISIONS THAT REINFORCE THE NEED FOR PROCEDURAL REINFORCEMENT OF CAREFUL FACT-FINDING.

In all correctional systems, there is pressure on institutional staff to "dump" inmates who are perceived as nuisances or who present management difficulties. For example, a prisoner who is a frequent user of the grievance system or is litigious, or connects to the press, is a nuisance to some prison administrations. A prisoner who has prevailed in the grievance system in litigation can become a symbol to other prisoners and to staff and invite retaliation. Prisoners who have special needs which make demands upon the institution, such as for special diet, medication and accommodations, are also burdensome.

It is human nature for prison staff to want to retain in their custody the inmates who are most easy to manage and to rid themselves of those who are most difficult to manage, annoying, or demanding or a nuisance. It is tempting and easy to lump those who need close custody because of their dangerousness with those the institution simply wants rid of without even being aware of it. And, of course, prisoners get reputations – sometimes deserved, sometimes not – which can combine with overblown rhetoric and meaningless

generalizations to short circuit meaningful fact finding and lead staff to jump to conclusions rather than reason to them. For example, "gang leadership" and "gang affiliation" are terms with little helpful meaning without greater definition and specificity. To be sure, there are prisoners who lead and engage in concerted activity which can undermine prison management, order, and the safety of staff and prisoners. However, some officials may be tempted to "overdiagnose" the fact and degree of involvement in such dangerous conduct, as well as a risk of crediting false or distorted information from unreliable informants who may have private agendas unrelated to prison order.

The antidote is clear: specific, reliable fact finding and the application of those facts to a clear legal standard by a disinterested body within the prison administration in a reasoning process, and review of that decision by higher authority in the correctional system.

Among those dumped, inevitably, are the mentally ill. While some supermax prisons have criteria for excluding the mentally ill, in practice there are many prisoners who do not fit standardized diagnostic criteria but are clearly mentally ill in ways that affect their behavior; there are also prisoners whose mental illnesses simply are not adequately diagnosed. These are the marginal, and prisons are full of such people. Their mental condition can lead them to behave in ways that lead to the conclusion their problems are primarily behavioral, when they are in fact mental, and best addressed in a different setting. Placement of such individuals in a supermax setting is particularly important to avoid, since the combination of highly restrictive conditions and rules, conditions of sensory

deprivation, and their mental health condition, compounded by the difficulty of obtaining mental health care in the supermax setting tends to result in further misbehavior, resulting in further disciplinary action and prolonged retention in supermax, and often in worsening of the underlying mental health condition.[5]

Finally, in every prison system in America, there is pressure to fill all cells because every prison system is overcrowded. There is undoubtedly pressure in Ohio, as there is in Wisconsin, to keep the Supermax cells filled. It is difficult to justify empty cells when other prisons are overcrowded, and especially hard to justify the high cost of Supermax when the cells are not full. (In Wisconsin, the cost to operate Supermax is more than double that of our maximum security institutions.) There is often a temptation, when under pressure to fill cells, to overclassify if the empty cells are at higher custody levels.

Requiring strong fact-finding procedures positions those charged with the placement decisions to resist pressure for dumping and for overclassifying to fill cells – both explicit external pressures and the unconscious bias to which those working in the correctional environment may become prey. It allows decision makers to point to legal standards that govern their decisions and the need for sufficient facts to satisfy the standard, in the face of informal and cultural pressure to place or keep inmates in Supermax. It also helps the decision makers maintain their focus on the relevant placement criteria and on

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[5] This last conclusion is supported both by prison administrators' experience and by substantial mental health literature. *Amici* understand there will be a separate *amicus* brief addressing the latter.

the relevant facts and other concerns at issue for each individual prisoner.

A. Necessary Elements of the Placement Process

To ensure the reliability and integrity of the decision to place a prisoner in a supermax prison, the following are necessary and can be provided without undue burden on prison staff.

1. There should be a clear legal standard – criteria – upon which the decision is based. The criteria to be relied upon in an individual case should be specified. It appears that Ohio has promulgated such criteria and they are not in controversy.

2. The prisoner should know in advance what is at issue in the hearing. If the prisoner does not, the fact-finding process is impaired because the prisoner cannot address the relevant issues, and the legitimacy of the process is destroyed because the prisoner will feel (correctly) that he did not have a fair opportunity to respond to the allegations against him. Ordinarily, the prisoner should have advance access to all the evidence to be relied upon and an opportunity to rebut, explain, and add to the facts, subject to the need in some cases to withhold information for safety or security reasons (to protect the identity of an informant, for example). It appears that the Ohio practice is in some cases to base decisions on considerations that are not made known to the prisoner, or are disclosed only after a decision is made. Such a practice fundamentally undermines both the fairness and

the utility of the hearing procedure and should be avoided except in instances of absolute necessity.

3. The hearing process of necessity will combine the inquisitorial with the adversarial. If facts must be withheld from the prisoner the hearing body must inquire about the facts withheld to ensure their reliability. Inquiry should be made about the circumstances under which the information developed and any incentives, explicit or implicit, for providing the information. After all, prisons are full of informants of varying reliability.

4. Prisoners should be able to call witnesses when there are facts at issue that witnesses may shed light on. While allowing witnesses can present risks, existing law and prison officials' experience with witnesses in disciplinary hearings allows them to limit the right when necessary (e.g., to protect the identity of confidential informants) and to exclude witnesses who do not have relevant information.

5. Experience shows that cross-examination by prisoners or their advocates is awkward, time-consuming and problematic in a prison setting. For this reason, the hearing body must be independent, but must be willing, indeed required, to make its own inquiry of witnesses and information when further inquiry is indicated. It is often unrealistic to expect a prisoner's advocate – which

should be available as part of this process[6] – to press staff witnesses in ways that will ensure reliable fact finding.

6. In its decision, the hearing body should specifically find the facts upon which it relies and analytically relate those facts to the criteria for placement and retention. The purpose of doing so is not just to make a record, but to ensure the soundness of the decision. A hearing body that is required to explain its decisions carefully is more likely to make them carefully and catch its mistakes before they become final. Some subjective level of certainty about the facts and inferences should be required. Given the serious consequences of making a mistake, it should not be sufficient that the facts and inferences be merely plausible. They should probably be at least more likely than not.

7. The fact finding and analytic reasoning process need to be specific enough to allow meaningful review of the decision at higher levels of the prison system.

B. The Release Decision

An important goal of correctional administrators should be to get prisoners out of supermax as quickly as is safely

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[6] We refer here to assistance by an employee, as discussed in *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974), in connection with disciplinary hearings.

possible.[7] There is no interest in keeping a prisoner in such conditions unnecessarily. Doing so after the necessity has passed is an unjustified infliction of suffering and also does damage to penological interests, since prisoners treated in such fashion are likely to become embittered and more difficult to manage, and in many cases their mental health may be at risk. For these reasons, a primary goal of supermax confinement should be ending it as quickly as is safe. On the other hand, releasing a prisoner who continues to present such risks that supermax confinement remains justified presents an obvious danger to safety and security.

For these reasons, the decision and process for review of supermax confinement must be just as careful and reliable as the process for placing them in it initially, and should be similar to that initial placement. The need for clear standards, notice to the prisoner of what will be at issue at the hearing,[8] inquiry into

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[7] In addition to the procedural means at issue in this case, prison systems that use supermax facilities and other close confinement must pay attention to creating means and opportunities for prisoners to get out of that status by demonstrating willingness and ability to abide by prison rules when in the company of others.

[8] The issues at a review hearing will not be identical to those at the initial hearing, since the prisoner's conduct since the last hearing will always be relevant to the decision to retain or to release – especially in a system like Ohio's which allows as much as a year to elapse between hearings. This unusually long interval between review hearings, which is undesirable in itself because it increases the risk of unnecessarily prolonging

factual issues, and specificity in fact-finding and relating those facts to the standard for retention in supermax confinement are equally important at the review stage.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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supermax confinement, enhances the importance of careful fact-finding at each review hearing.